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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 705

MATTHEW J. CONNELLY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Matthew J. Connelly, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause on November 9, 1959.[1]

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 271 F. 2d 333, set out in a separate Appendix to this Petition (App. 92-98). The opinion of the District Court is unreported and is also set out in the Appendix (App. 76-91).

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[1] A separate Petition for Certiorari is being filed by T. Lamar Caudle, who was a co-defendant and co-appellant in the courts below.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on November 9, 1959 (App. 99). Rehearing was denied on December 14, 1959 (App. 100). On December 29, 1959, Mr. Justice Black extended the time for filing the Petition for Writ of Certiorari to and including February 12, 1960 (App. 101). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where a motion for a new trial based on newly discovered evidence is made in a criminal case, is the criterion to be applied

   (a) that the evidence be of such a character as to persuade a judge that on a new trial it would bring about an acquittal, as the courts below have held? or, rather

   (b) that a jury might attach significance to the evidence favorable to the defendant had the evidence been before it, as this Court ruled in *Griffin* v. *United States*, 336 U.S. 704?

2. Under the circumstances of this case, did the denial of the motion for the new trial by the successor judge (who had not presided at the trial) constitute a gross abuse of discretion and result in a deprivation of due process of law to petitioner?

3. Where the prior decisions of the courts below were predicated upon the assumption that Schwimmer's testimony would be either unavailable or unfavorable, and this assumption has now been unequivocably disproved, does not "the interest of justice" require the granting of a new trial under Rule 33, F.R.Crim.P.?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> "* * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *"

The Sixth Amendment to the Constitution of the United States provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * *"

Rule 25, Federal Rules of Criminal Procedure, provides:

> "If by reason of absence from the district, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

Rule 33, Federal Rules of Criminal Procedure, provides in relevant part:

> "The Court may grant a new trial to a defendant if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. * * *"

STATEMENT

This is a proceeding instituted upon a motion for a new trial on the ground of newly discovered evidence filed by petitioner in the United States District Court in St. Louis, on June 12, 1958 (R. 6-8).[2] A separate but similar motion was filed by co-petitioner T. Lamar Caudle on June 18, 1958 (R. 50-52).

This case was before this Court on a prior occasion when a Petition for Certiorari was denied. No. 739, O.T. 1957, 356 U.S. 921, 964. In order to place the issues presented by this Petition in their proper perspective, a brief synopsis of the entire case appears appropriate.

The indictment named as defendants Matthew J. Connelly, former Appointment Secretary to President Truman; T. Lamar Caudle, former Assistant Attorney General in charge of the Tax Division of the Department of Justice; and Harry I. Sehwimmer, formerly a lawyer in Kansas City, Missouri. Named as co-conspirators, but not defendants, were Irving Sachs, a St. Louis shoe broker; Shu-Stiles, Inc., a corporation of which Sachs was president; and Ellis N. Slack, an attorney on Caudle's staff in the Department of Justice.

The charges were twofold:

(a) conspiracy to defraud the United States of the proper administration of the Internal Revenue laws and regulations and of the proper and faithful service

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[2] The symbol "R" is used to refer to the record of the proceedings in the Court of Appeals on this motion; the symbol "Tr." to refer to the transcript of the original trial proceedings in the District Court; and the symbol "Or. R." to designate the record proper in the trial proceedings. Reference to the separate Appendix filed herewith is designated by "App." followed by the page number.

of petitioner and Caudle in violation of Section 371, Title 18 U.S.C. It was alleged that as part of the conspiracy Sachs and Shu-Stiles, the two taxpayers for whom Schwimmer was attorney, and Schwimmer, would promise and give money or other valuable consideration to influence petitioner and Caudle, and that in turn these officials would corruptly influence other Government officials to decline criminal prosecution of Sachs for violation of the Internal Revenue laws.

(b) that the defendants had committed the offenses of bribery, perjury and knowingly making false statements and entries. These charges were ordered to be withdrawn from the consideration of the jury by Judge Rubey M. Hulen, who presided at the trial (Tr. 3130).

Twenty-one days after the trial began, a mistrial was ordered as to Schwimmer because of illness (Tr. 1486, 1535). Petitioner and Caudle thereupon moved for a mistrial as to themselves, but their motion was denied and the trial was continued. Both petitioner and Caudle were convicted of the conspiracy charge and each was thereafter sentenced to two years' imprisonment and fined $2,500.00 (Tr. 562, Vol. I).

After the verdict, but before pending motions for a mistrial and for a judgment of acquittal could be argued (Tr. 2888, 1536-38, 2910), the trial judge met his tragic death (Tr. 484, Vol. I). Judge Gunnar H. Nordbye was thereupon appointed as successor judge pursuant to Rule 25, F.R.Crim.P. (Tr. 487, Vol. I).

Following further proceedings before the successor judge (Tr. 562, Vol. I), the Eighth Circuit affirmed the convictions of petitioner and Caudle on November 15, in an opinion reported at 249 F. 2d 576, and applications for a writ of certiorari were denied by this Court. 356 U.S. 921, 964.

During the thirty-eight day trial, sixty-six witnesses testified in person and more than one thousand pages of exhibits were introduced by the Government. Schwimmer was presented as the planner and moving force of the alleged conspiracy. But the evidence relied upon to tie petitioner into this conspiracy was exclusively circumstantial, consisting primarily of documents seized from Schwimmer's files and testimony regarding his activities. There was no evidence whatever that petitioner ever met Sachs, any members of his family, or any of his lawyers other than Schwimmer. At best, the case against petitioner rested solely on inferences drawn from his contacts and dealings with Schwimmer. 249 F. 2d at 586-87.

The crucial evidence as to petitioner focused upon two matters: six telephone calls which he made on behalf of Schwimmer, and an oil royalty transaction into which he was led by Schwimmer. Petitioner had known Tom Evans, a Kansas City businessman and a close friend of President Truman, since the early forties (Tr. 727, 2442-45). Through Evans in 1944, petitioner met Schwimmer, attorney and friend of long standing of Evans (Tr. 2446, 727-28). Over the years, petitioner was called upon to help Schwimmer and Evans on a number of different matters, *pro bono*, business and professional, ranging from introductions to atomic scientists, Palestine problems, making hotel reservations, and the like (Tr. 2451-55, 776-82, 2472-73, 765-68).

The Government's evidence with regard to the Sachs case showed that during the two and one-half year period, August 1948 through January 1951, petitioner made the following six phone calls to arrange the following appointments for Schwimmer: one call to Internal Revenue Commissioner George Schoeneman (Tr.

1923); one to General Counsel Charles Oliphant (Tr. 582, Vol. V); two to Caudle (one for a continuance and the other for an appointment) (Tr. 2597-98, 2601); and two to Caudle's secretaries for appointments (Tr. 1587). The issue presented by these calls is not so much what was said, but the motives and implications involved: whether they were part of the routine services rendered by petitioner (his position, it must be recalled, was Appointment Secretary), or whether they were conscious efforts on his part corruptly to influence other Government officials with regard to the Sachs case.

Through the innocent participation of Evans, who knew nothing about the Sachs case (Tr. 770-71), Schwimmer persuaded petitioner to purchase an oil royalty which he, Schwimmer, represented as a profitable investment. As a Government witness, Evans testified that after conversations with Schwimmer and petitioner, he loaned petitioner $750.00 on November 11, 1949, with which to buy the oil royalty recommended by Schwimmer (Tr. 731-44). Unknown to petitioner, Schwimmer repaid Evans the following day (Tr. 748, 760). In November, 1949, Schwimmer secured an oil royalty in Oklahoma, and on December 30, 1949, paid $3,600.00 for the royalty (Exs. 76-B, 76-C, Tr. 1100), a fact which was unknown both to Evans and petitioner (Tr. 772, 2490).

Petitioner left the entire matter in the hands of Schwimmer, who for a period of about two years collected the monthly royalty checks, aggregating $1,400.00, and sent them to petitioner. (Tr. 2484-85, Ex. 88 A-Y, Tr. 1151). Sometime in January, 1952, Schwimmer recommended to petitioner that he sell the oil royalty, arranged for the sale at $1,650.00 (Ex. 105, Tr. 1427) and, unknown to petitioner, himself

acquired the oil royalty for his daughter, Jacquelyn Kanter (Tr. 1478, 2492, 2531-32).

Petitioner told Evans that he wanted to pay him back, but Evans answered that petitioner had already done so (Tr. 750, 2511). Upon checking his records after testifying before the Grand Jury in November of 1955, Evans discovered that he had been in error in saying that petitioner had repaid him, since it was Schwimmer who had done so, and advised petitioner accordingly, whereupon petitioner repaid the $750.00 (Tr. 784-85, 751).

At the trial, Schwimmer's letters and records were introduced as part of the Government's case without any evidence that petitioner had ever seen, or known about, any of them. Before Schwimmer could explain these writings, either on his own behalf or as a witness for petitioner, he was severed from the trial (Tr. 1486, 1535). Soon thereafter, he suffered a very severe stroke which caused a complete loss of the power of speech (asphasia), of reading (alexia) and of writing (agraphia), in conjunction with the paralysis of his right side (R. 11, 218, 291).

In the Spring of 1958 an appreciable improvement in Schwimmer's power of speech was reported by his attending physicians; the slow recovery continued in the Summer of 1958 to the extent that he could then speak, although not without substantial difficulties (R. 11, 215-16).

At this juncture, a sworn statement was procured from Schwimmer at his New York residence (App. 1-14), and petitioner moved in the District Court for a new trial based on the testimony of this witness (Motion: R. 6-8).

As submitted to Judge Gunnar H. Nordbye at the hearing held on December 15, 1958, petitioner's motion

rested both on the sworn statement of Schwimmer and upon his deposition *ad perpetuandum* taken on written interrogatories pursuant to the orders of Judge Nordbye of August 14 and September 15, 1958 (R. 3).

Schwimmer's testimony covers four subjects:

(a) *Exhibit 100-J.* This was the crucial document at the trial with respect to petitioner, and was considered by the prosecutor as the *sine qua non* of the Government's case. It provided the only *possible* link between Sachs' money and petitioner. The cryptic Exhibit contained the following notation:

"Oct.-49

Loan $2500	
From I. Sachs	
Shu-Stiles	$10,000
Pd out Oil Royalty M.C.	4,200
Held in Escrow to be paid out depending on whether I. Sachs case is dropped."	5,800

The Exhibit was admitted at the trial upon evidence that it was in Schwimmer's handwriting and found among his papers (Tr. 1168-73, 1223-26, 1241, 1368).

Schwimmer's testimony now discloses that the entry was intended by him as a device to support his failure to include in his 1949 income tax return the $10,000 he had received from Sachs (App. 11, 12, 28-29); that the entry was not made in October, 1949, but at some subsequent date (App. 11, 29); that the escrow balance was to be paid to *him* if the Sachs case were dropped; that he, Schwimmer, kept the money (App. 11, 12, 29); and that he had never shown the entries to anyone named in the indictment (App. 12, 31).

(b) *Schwimmer's relationship to petitioner.* Schwimmer testified that he never discussed with petitioner the merits or details of the Sachs case (App.

9, 25, 28); that he never asked petitioner to intercede with anyone in the Government on behalf of Sachs or of Schwimmer himself, except for requests for appointments and the continuance of a conference (App. 8-9, 26, 28); that he never made any promises of any kind to, or any agreement with, petitioner in connection with the Sachs matter (App. 9, 13); and that when he mentioned petitioner's name to Government officials, he did so without petitioner's knowledge (App. 9).

(c) *Exhibit 102.* Schwimmer explained that Exhibit 102, his letter to petitioner of January 5, 1948, in which he stated:

> "Tom informed me of your kindness in offering to help me, which I sincerely appreciate. * * *
>
> "I hope to leave Kansas City about the 17th of this month and, if I may, I will call or wire you as to the date when I will be in Washington." (Tr. 1952, text, Tr. 4103)

related to Tom Evans' report that petitioner was willing to help him in a helium matter—a subject not connected in any way with the Sachs case (App. 6-8, 26-27).

(d) *Oil royalty.* Schwimmer testified that he never disclosed to petitioner the actual price he had paid for the oil royalty (App. 13, 31), nor that he had repaid Evans the amount of the loan made by Evans to petitioner (App. 13, 31), nor that Schwimmer's daughter had purchased the royalty from petitioner (App. 31).

Judge Nordbye's opinion denying the motion for a new trial found that the evidence adduced by petitioner is newly discovered (App. 79-80); that petitioner had acted with due diligence (App. 79); that Schwimmer had been unavailable as a witness until the Spring or

Summer of 1958 (App. 79); that the evidence is relevant (App. 80), and that Schwimmer is not mentally incompetent so as to bar his testimony from the consideration of a jury, which should pass on its "weight and credibility" upon a new trial (App. 81). Judge Nordbye, however, held that "it is simply incredible" that Schwimmer's testimony could produce an acquittal for petitioner and Caudle (App. 90), and that it seemed "inconceivable" that this evidence could have any weight in producing a different verdict if a new trial were granted (App. 91). Judge Nordbye's decision was affirmed by the Eighth Circuit in a brief opinion which adopted his reasoning almost *in haec verba* (App. 96-98).

REASONS FOR GRANTING THE WRIT

I

It is obvious on the face of the opinions of both courts below that the criterion which they applied in determining whether the motion for the new trial should be granted was whether Schwimmer's testimony would "bring about an acquittal" in a new trial (App. 91, 98).

The Court of Appeals was plainly relying upon the fifth "verity" of the formula it announced in its decision in *Johnson* v. *United States* (C.A. 8, 1929) 32 F. 2d 127, 130, that the evidence "must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal." (App. 96).

The district judge, though not expressly citing any particular authority, apparently relied upon the same principle. At different places in his opinion he set forth the test as: "This Court is charged now with the duty of determining whether * * * a jury probably

would acquit these moving defendants * * *" (App. 89); "it is my considered opinion that it is not probable that the proffered testimony would result in an acquittal * * *" (App. 90); "It is simply incredible that the * * * testimony * * * could possibly have the weight and effect of producing an acquittal * * *" (App. 90); and that the testimony would not have "sufficient weight with a jury to bring about an acquittal" (App. 91). However phrased, Judge Nordbye was also clearly applying the fifth verity of the *Johnson* formula.

But this criterion, which has found its way into other circuits,[3] has never been embraced by this Court.[4] On the contrary, this Court seems to have applied a substantially different test: namely that a motion for a new trial should be granted where the newly discovered evidence is of such a nature that a jury might attach significance to it favorable to the defendant. In *Griffin* v. *United States*, 336 U.S. 704, a motion for a new trial based upon newly discovered evidence had been denied by the trial court and the denial was affirmed by the Court of Appeals. This Court's decision reversing the denial of the motion directed first that the Court of Appeals rule upon whether the newly discovered evidence was admissible and, thereafter, "to consider further whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have

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[3] See e.g., *Shibley* v. *United States* (C.A. 9, 1956) 237 F. 2d 627, 332, *cert. den.*, 352 U.S. 873; *United States* v. *Rutkin* (C.A. 3, 1953) 208 F. 2d 647, 649; *United States* v. *On Lee* (C.A. 2, 1953) 201 F. 2d 722, 723-24, *cert. den.*, 345 U.S. 936.

[4] In *United States* v. *Johnson*, 327 U.S. 106, 110-11 nn. 4 & 5, this Court carefully refrained from passing upon the correctness of the "produce a different result" test. A similar reservation was contained in *Mesarosh* v. *United States*, 352 U.S. 1, 9, and particularly n. 4.

attached significance to the evidence favorable to the defendant had the evidence been before it." 336 U.S. at 709.[5]

In *Mesarosh* v. *United States*, 352 U.S. 1, this Court again manifested a similar concern that a judge not encroach upon the function of the jury in determining motions for a new trial based upon newly discovered evidence. In *Mesarosh*, it will be recalled, the Solicitor General filed a motion calling the attention of the Court to the fact that there was serious reason to doubt the truthfulness of a Government witness' testimony at the trial, and suggested that a hearing be held in the District Court to determine the issue of the witness' truthfulness. In rejecting this suggestion and directing a new trial, this Court eloquently stated:

> "* * * it cannot be determined conclusively by any court that his testimony was insignificant in the general case against the defendants. * * * The district judge is not the proper agency to determine that there was sufficient evidence at the trial, other than that given by Mazzek to sustain a conviction of any of the petitioners. Only the jury can determine what it would do on a different body of evidence, and the jury can no longer act in this case." 352 U.S. at 10-12.

The decision in *Griffin*, as supplemented by *Mesarosh*, indicates that this Court has placed primary emphasis

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[5] Dissenting on another point, the minority opinion in the *Griffin* case stated:

> "It is clear that this evidence might change the jury's verdict. To make admissibility depend upon mechanical and often illogical variations in the size of the doubt in a judge's mind is an invasion of the jury's function. 'It is pertinent here to remark, that both the effect of [the witnesses'] testimony and [their] credibility was to be weighed by the jury.' *Wiggins* v. *People in Territory of Utah*, *supra*, 93 U.S. at page 469." 336 U.S. at 722.

on the role of the jury, rather than the judge, in the evaluation of newly discovered evidence when a new trial is requested. While the determination of the motion for a new trial is necessarily a judicial function, this function must be exercised with a view towards allowing the jury to make the ultimate decision between guilt and innocence. And if the newly discovered evidence is of such a nature that a jury might attach favorable significance to it, then the judicial function is at an end and the judge has no alternative but to grant a new trial.

The distinction between this formula and that applied by the courts below in this case (and in other circuits[6]) can be the difference between granting and denying a motion for a new trial. The instant case is an excellent example. The courts below have agreed that Schwimmer's testimony is relevant (App. 80), competent and obviously admissible (App. 81). That it will have a tendency to explain heretofore inadequately explained writings[7] or require the exclusion of damaging evidence admitted at the trial[8] or dispel improperly drawn inferences based solely upon circumstantial evidence[9] is plain from a reading of Judge Nordbye's opinion alone. Yet the new trial has been denied, and the denial upheld, solely because the judges below have been persuaded *in their own minds* that Schwimmer was a "fixer", "the arch conspirator", "an admitted perjurer" and a "discredited witness" (App. 90, 97); and on the basis of these characterizations, that it was "inconceivable" and "incredible"

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[6] See n. 3, *supra*.

[7] See pp. 16-17, 21-22, *infra*.

[8] See pp. 17-19, *infra*.

[9] See pp. 20, 22, *infra*.

that Schwimmer's testimony would "have sufficient weight with a jury to bring about an acquittal" (App. 91, 98).

This reasoning may be consistent with the fifth verity of the *Johnson* formula but it transgresses the permissible limits established by *Griffin* and *Mesarosh*. In relying upon *their* evaluation of Schwimmer's credibility as the basis for denying the motion for the new trial, the judges below have usurped the function of the jury. For once it was determined that Schwimmer's testimony "should be received and considered by a jury" and that a jury might attach favorable significance to it, the mandate of the *Griffin* case requires that a new trial be granted; and *Mesarosh* makes it plain that a jury rather than a judge must determine what it would do on another body of evidence.[10]

Motions for new trials based upon newly discovered evidence often raise issues of a delicate or complex nature which make the task of the trial judge difficult enough. But this difficulty is compounded where the legal criterion applicable to such motions is not clearly delineated. Is it the fifth verity of the *Johnson* case which controls, or is it the test of the *Griffin* case which governs?

The determination of this question is obviously of vital importance to the fair and orderly administration of criminal justice in the federal courts; and it is a question which only this Court can definitively resolve.

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[10] In *Clark* v. *United States* (C.A. 9, 1947) 163 F. 2d 748, *cert. den.*, 333 U.S. 864, the court stated:

> "It is obvious that if the evidence * * * were actually newly discovered, it was a matter for the jury and not for the judge to consider its weight against the testimony of the complaining witness." 163 F. 2d at 749.

II

A. If it be assumed that the district judge did apply the appropriate criterion in determining the motion for the new trial, then, under the circumstances of this case, his denial of that motion constituted a gross abuse of discretion and resulted in a denial of due process to petitioner. On this issue, it becomes necessary to review some of the facts of the case.

(1) *Exhibit 100-J.* This cryptic and misleading piece of paper written by Schwimmer, and never disclosed to anyone until its introduction by the prosecutor, was the thread upon which the case against petitioner was suspended. Apart from the context of the Exhibit itself, there was absolutely no proof connecting petitioner with any conspiracy in the Sachs case. The prosecutor's admission to the trial judge is unequivocal:

> "* * * the minute your Honor excludes it [the Exhibit] you are going to get a mistrial motion on both defendants. The minute you do, there she goes." (Tr. 2883-84).

Under the urging of the prosecutor, who pointed out that the Government had no right to appeal (Tr. 2884), Judge Hulen finally admitted the Exhibit, with distinct reservations, in the incomplete state of the record at the trial. While death prevented Judge Hulen's final ruling, in the course of the argument, he put his finger on the real vice involved in admitting this document when he stated:

> "The Court: That's what I am worried about is the final sentence, it would mislead the jury as to what the balance of that money would be used for. You draw one conclusion *and the defendants have no opportunity to show that that conclusion is an erroneous one.* The last line of it, 'balance

to be paid on case being dropped,' as I recall it. It doesn't say who to." (Tr. 2885; emphasis added)

But now Schwimmer has spoken. His testimony supplies the answer which Judge Hulen realized was essential to the defense. The Judge's statement presupposes the admissibility of Schwimmer's explanatory testimony. If that testimony was admissible then—when it was unavailable—why should it be withheld from a jury now when it is readily available?

Schwimmer's testimony stands as the sole evidence on three vital points: the *purpose* of the entry, the *identification* of the person to whom the escrow balance was to be paid, and the *time* the entry was made. This direct and positive sworn testimony on these critical points was not only relevant, as found by Judge Nordbye (App. 80), but was vital to petitioner's defense.

Schwimmer's testimony indicates (1) that the escrow balance of $5,800 was to be paid to him—Schwimmer—if the Sachs case were dropped, and that he kept the money (App. 11, 12, 29); (2) that the entry was concocted by him as a device to support his failure to include in his 1949 income tax return the $10,000 he received from Sachs in October, 1949 (App. 11, 12, 28-29); and (3) that the entry was not made in October, 1949, but at some subsequent date (App. 11, 12, 29).

The purpose, then, of the entry was for a tax objective peculiarly of value to Schwimmer alone, and not in furtherance of the conspiracy charged in the indictment. It was, in fact, plainly a narrative statement comparable to that made by a conspirator to his wife in *Magola* v. *United States* (C.A. 9, 1934), 71

F. 2d 65, where the conviction was reversed for error in admitting such testimony.[11] Since Schwimmer's testimony indicates that the entry was not made in October, 1949, but subsequent thereto, this provides further basis for excluding the Exhibit as not having been made within the course of the conspiracy. This testimony lends unassailable support to petitioner's argument at the trial that the essential foundation of the time element, which is a prerequisite to the admission of a document, cannot be established by the proffered document itself. *Masterson* v. *Penn. R. Co.* (C.A. 3, 1950), 182 F. 2d 793.[12]

In sum, since there is no evidence that the entry was made by Schwimmer in furtherance of, or during the existence of, the alleged conspiracy,[13] and the affirmative burden to prove that it was so made rests on the Government, the Exhibit would be inadmissible on a

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[11] Accord: *Harrington* v. *United States* (C.A. 8, 1920) 267 Fed. 97, 103; *Van Riper* v. *United States* (C.A. 2, 1926) 13 F. 2d 961, 967; *United States* v. *Goodman* (C.A. 2, 1942) 129 F. 2d 1009, 1013; *United States* v. *Guido* (C.A. 3, 1947) 161 F. 2d 442. Compare: *Bihn* v. *United States*, 328 U.S. 633; and *Lutwak* v. *United States*, 344 U.S. 604.

[12] It was also contended at the trial that the entry probably was not made until after the oil royalty was purchased (December 30, 1949), since the entry used the past tense ("pd.").

[13] The last overt act is charged in the indictment to have occurred on February 27, 1952 (Or. R. 10). Exhibit 100-J was in the possession of, or available to Schwimmer for a long time, before its seizure by the Government in October, 1956, and after the actionable period of the alleged conspiracy. Although the Government charged a conspiracy continuing to the date of the indictment (Or. R. 1), under the rule of *Fiswick* v. *United States*, 329 U.S. 211, 217, the conspiracy does "not extend beyond the date of the last overt act * * *." See also, *Krulewitch* v. *United States*, 336 U.S. 440, 444; and *Paoli* v. *United States*, 352 U.S. 232, 237.

new trial. *Krulewitch* v. *United States*, 336 U.S. 440, 443; *Fiswick* v. *United States*, 329 U.S. 211, 217.

With Exhibit 100-J either excluded from a new trial, or at least explained by Schwimmer's testimony, the slender thread linking petitioner to the conspiracy would be severed. Certainly, in a new trial, this critical Exhibit could not be used as it was in the original proceeding.

The Exhibit was used first to imply that it reflected another item with which to pay petitioner and also that there was an agreement between petitioner and Schwimmer with regard to the Sachs case. For example, in his closing argument, the prosecutor repeatedly called the attention of the jury to the Exhibit, emphasizing its crucial importance to the Government's case and asserting that the $10,000 was a "slush fund" which Schwimmer got "by the dark of the moon" to be disbursed as a reward for defendants' participation in the conspiracy (Tr. 2945-46, 3101-02).[19]

The jury was exposed to all of this without benefit of any explanation from Schwimmer—the only person who could dispel the evil insinuation. The jury verdict was thus tainted by what Judge Hulen branded as "a very poisonous piece of evidence" (Tr. 2885); and the conviction of the petitioner resulted from the inference that the escrow balance was held for his

[19] Again, in its brief before the Eighth Circuit on the original appeal, the Government contended:

> "If in October of 1949 Schwimmer set up on his books an item sufficient to cover the purchase of a royalty for Connelly and *another item with which to pay him* or others if the Sachs case should be 'dropped', a jury could reasonably infer that such an agreement had already been struck with Connelly. * * *" (Government's Brief, pp. 162-63; emphasis added).

account. The use of Exhibit 100-J at the trial in this case is no different than the testimony in *Mesarosh v. United States, supra*, where this Court ordered a new trial because it found that that evidence "has tainted the trial as to all petitioners". 352 U.S. at 11.

(2) *Schwimmer's relationship to petitioner.* The only participation of petitioner in the whole Sachs case was shown to consist of *six phone calls* concerning appointments. None of those six calls required knowledge of the merits of the Sachs case on the part of petitioner. None is shown to have carried any weight in the determination of the merits of the Sachs case on the part of the administrative officials involved.

Petitioner denied any knowledge of the merits of the case, and now Schwimmer testifies unequivocally that petitioner "did not know what the Sachs matter was" (App. 25), and that he did not discuss "the details" or "the merits" of the Sachs case with petitioner (App. 28, 9).

Thus positive and direct sworn testimony now dispels the inferences and immendoes to the contrary which were drawn and relied upon by the Government at the trial. And to the extent that Schwimmer's testimony may corroborate petitioner's testimony at the trial, it is a sound ground for granting a motion for a new trial. *Amos v. United States* (C.A. D.C., 1954), 218 F. 2d 44.[15]

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[15] See also, *United States v. Rutkin* (C.A. 3, 1953) 208 F. 2d 647, 654 n. 5; *Dent v. Simpson* (Kan., 1909) 105 P. 542, 544; *Bradley v. Kelley* (Vt. Sup. Ct., 1933) 168 A. 554; *Harris v. Jay* (1930) 92 Ind. App. 543, 174 N.E. 107; *Tucker v. Wyoming Coal Mining Co.* (Wyo. Sup. Ct., 1909) 104 P. 529; *Van Meter v. Beckers* (Mo. App., 1931) 42 S.W. 2d 951; *Foster v. Rasamond* (Ala. App., 1937) 180 So. 334; *Perry v. Hammock* (Ga. App., 1947) 42 S.E. 2d 651; and 1 *Jones on Evidence* (1958) Sec. 7, p. 9

(3) *Exhibit 102.* To prove a close and early connection of petitioner with the Sachs case, the Government introduced in evidence a letter from Schwimmer to petitioner dated January 5, 1948, which is quoted *supra* at p. 10.

At the trial, Exhibit 102 was misrepresented as relating to the Sachs case. The prosecutor read to the jury the testimony given by petitioner before the Grand Jury, where, upon being directed to the first two lines of the Exhibit, petitioner was unable to recollect the subject to which the seven-year-old letter related (Tr. 1928).

Of necessity, petitioner's evidence that the letter concerned only a helium matter was merely circumstantial, since no one could testify as to just what Schwimmer meant.[18]

On the basis of that circumstantial evidence, Judge Hulen concluded:

> "* * * it plainly is in the record now that that paragraph in that letter [of January 5, 1948] referred to the helium matter" (Tr. 2900)

but, on account of these circumstances, he permitted argument based on "deductions and reasonable inferences" from the letter (Tr. 2897), as bearing on

[18] Thus, Evans testified that he made an appointment for Schwimmer with petitioner regarding a helium matter then pending in the Interior Department in December, 1947, and that he reported that conversation to Schwimmer (Tr. 2327). Former Secretary of the Interior Chapman testified that he met Schwimmer in Washington in the middle of January, 1948, after a call from petitioner (Tr. 2257, 2274, 2276). Petitioner corroborated the above in a general way (Tr. 2458). Rubin confirmed that he had employed Schwimmer on the helium matter; testified that he paid $714.99 to Schwimmer for the expenses of his January trip to Washington, and identified Schwimmer's appurtenant invoice (Tr. 2320-3; petitioner's Ex. 4, Tr. 4240).

the Sachs case (Tr. 2903-04). Now Schwimmer has directly identified the helium matter as the specific subject of his letter of January 5, 1948 (App. 7-8, 26-27) and has eliminated whatever doubts may have existed at the trial as to the letter's significance.

(4) *Oil royalty.* Both Evans and petitioner testified at the trial that they were never told by Schwimmer, nor were they otherwise aware of the fact, that the oil royalty cost $3,600 instead of $750.00, the amount which Schwimmer had represented to them (Tr. 772, 2490). Notwithstanding the absence of any evidence in the record to disprove their testimony, the successor judge relied on the inference suggested by the Government that it was inconceivable that petitioner should not have known the price actually paid by Schwimmer (Appendix to original Petition for Certiorari, p. 57a).

Now Schwimmer states positively that "I made the amount $750"; that that is what he told petitioner was the cost of the oil royalty; and that he did not disclose to petitioner what the actual cost of that oil royalty had been (App. 13, 31). Here again, direct testimony by a person other than petitioner is now available for the first time. Thus, the inferences relied upon at the trial are dispelled by direct and positive testimony and the factual issues involved are placed in an entirely different frame of reference.

This review indicates that Schwimmer's testimony is entirely "new"; it is the positive, direct testimony from the only man who can explain the critical papers on which petitioner's conviction rests. It stands uncontradicted by any direct evidence to be found within the four thousand odd pages of the transcript; it is met only by speculative suggestions. But, "speculation" has never been allowed to take the place of "proof". *In re Sawyer*, 360 U.S. 612, 628.

It is hard to conceive how any newly discovered evidence could justify a new trial, if this evidence cannot.

B. In an earlier section of this Petition (pp. 13-15, *supra*) we have pointed out that the courts below appear to have usurped the function of the jury when they took upon themselves the evaluation of Schwimmer's credibility in determining whether a new trial would bring about an acquittal. If denial of the motion because of the courts' characterization of Schwimmer and his testimony as being "not worthy of belief" (App. 96) did not exceed the courts' power, certainly it constituted a gross abuse of discretion.

It is too well established to require citation that the issue of the credibility of a witness is for the jury and not for the court. Calling Schwimmer all the bad names in the world cannot change this basic principle. Indeed, this Court on prior occasions has been critical of instances in which a defendant, as a witness, was condemned or presumptions raised against his truthfulness. *Allison* v. *United States*, 160 U.S. 203, 210; *Hicks* v. *United States*, 150 U.S. 442, 452. Particularly relevant in this regard is the observation of the Second Circuit in *United States* v. *Reina* (C.A. 2, 1957), 242 F. 2d 302, that "our law has never undertaken to set any quantitative standards of authority; we have unconditionally left it to the jury to determine how persuasive the testimony of any witness will be." 242 F. 2d at 307.[17]

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[17] To the same effect are *Reagan* v. *United States*, 157 U.S. 301, 309-10; *Quercia* v. *United States*, 289 U.S. 466, 470; *Freeman* v. *United States* (C.A. 5, 1938), 96 F. 2d 13, *cert. den.*, 305 U.S. 596; *Rodin* v. *United States* (C.A. 2, 1911), 189 Fed. 568; and *Kemp* v. *United States* (C.A. 8, 1957), 160 F. 2d 406, 410, *cert. den.*, 311 U.S. 843.

Also relevant in this context is the decision of the Second Circuit in *Arnstein* v. *Porter* (C.A. 2, 1946), 154 F. 2d 464. In that case the trial judge had granted defendant's motion for summary judgment, describing plaintiff's deposition testimony as "fantastic" (a term extraordinarily similar to the characterization of Schwimmer's testimony as "incredible"). In reversing, the court stated:

> "Although part of plaintiff's testimony on deposition (as to 'stooges' and the like) does seem 'fantastic,' yet plaintiff's credibility, even as to those improbabilities, should be left to the jury. If evidence is 'of a kind that greatly taxes the credulity of the judge, he can say so, or, if he totally disbelieves it,' he may announce that fact, leaving the jury free to believe it or not.' If, said Winslow, J., [citing *Marston* v. *Dresen*, 85 Wis. 530, 535, 55 N.W. 896, 899] 'evidence is to be always disbelieved because the story told seems remarkable or impossible, then a party whose rights depend on the proof of some facts out of the usual course of events will always be denied justice simply because his story is improbable.' We should not overlook the shrewd proverbial admonition that sometimes truth is stranger than fiction." 154 F. 2d at 469.

The difference between a court's function in determining a motion for summary judgment in this regard and in determining a motion for a new trial is difficult to discern. In each instance a court must decide whether there is enough before it to warrant the submission of the case to a jury; and in each instance the court must be wary that it does not usurp unto itself what is, under the hallowed principles of our law, the exclusive province of the jury. When the district

judge denied the motion for the new trial in this case because it seemed "inconceivable" and "incredible" *to him* that Schwimmer's deposition would have "the weight and effect of producing an acquittal", he exceeded his role as a judge and grossly and patently abused his discretion.

The moving force of the dragnet conspiracy charged in the indictment was admittedly Schwimmer and, now that he can talk again, a jury should be permitted to hear him if due process of law and the commands of Rule 25 and Rule 33, F.R.Crim.P., have any meaning.

C. In considering whether the ruling of the successor judge constituted an abuse of discretion, this Court's decision in *United States* v. *Johnson*, 327 U.S. 106, must be taken into account. For in the *Johnson* case, this Court made it abundantly clear that an appellate court may not upset the decision of a trial judge on a motion for a new trial based upon newly discovered evidence because it might be in disagreement concerning the findings made by the trial judge on conflicting evidence.

The rational foundation of this rule, however, rests upon the special vantage point which the trial judge has with respect to a case, and the superior position which he acquires from having "conducted the original trial and [watching] the case * * * unfold from day to day." 327 U.S. at 112. A judge who conducts a trial becomes "exceptionally qualified" to pass upon a motion for a new trial (327 U.S. at 12[illegible]) for he is in a position to draw upon "his own knowledge of the original six-weeks trial."[illegible] (327 U.S. at 109).

[illegible] Compare *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. [illegible] where the superior position of the trial judge to pass on

Here, the basic predicate for the application of that rule is utterly wanting. The successor judge entered the case after the thirty-eight day trial was completed. He never saw any of the sixty-six witnesses, nor did he hear their testimony. He never heard the defendants who testified for five days at the trial. He did not observe Schwimmer in the courtroom during the period before his severance nor, to our knowledge, has he ever seen Schwimmer before the trial or since. He had no more perspective with regard to the actual, real live facts of the case than any reviewing court would have, for he had done nothing more than read the cold printed record. In short, he had acquired no special "feel of the case", and his ruling was not entitled to the deference usually accorded to rulings of trial judges on motions for a new trial based upon newly discovered evidence.[19]

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motions for a new trial is recognized for the reason that he enjoys

> "a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses." • • •

that he is

> "the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart"

and is therefore enabled

> "to view the proceedings in a perspective peculiarly available to him alone." 330 U.S. at 216.

[19] Even in a civil case, no great weight is attached by a reviewing court to the findings of a district judge who has not seen the witnesses testify at the trial, either because he is a successor judge as in *Federal Deposit Ins. Corp.* v. *Siraco*, (C.A. 2, 1949) 174 F. 2d 361, 363-64, and in *Brennan* v. *Grisso* (C.A. D.C., 1952, 198 F. 2d 532, or because all the testimony was presented at the trial in written form as in *Seagrave Corp.* v. *Mount* (C.A. 6, 1954) 212 F. 2d 389, 394 and the cases cited therein. See also, *Colby* v. *Klaus* (C.A. 2, 1949) 174 F. 2d 872, 874-75.

The intent of the defendants was called "the gist of this case" by Judge Hulen (Tr. 2893); and "the crucial question" by Judge Nordbye (Appendix to original Petition for Certiorari, p. 62a). And as the original opinion of the Eighth Circuit recognized, the Government's case rested on "circumstantial evidence" and "inferences" to be drawn therefrom (249 F. 2d at 580, 585-87).

How can the successor judge, who had to rely upon the cold record without ever having laid eyes upon any of the witnesses who testified in person at the trial, be allowed unfettered discretion to bar from consideration of a jury crucial evidence from the only man who could testify on the elusive element of intent? See, *Ingram* v. *United States*, 360 U.S. 672, 680.[20]

Certainly, the limitation of *United States* v. *Johnson*, *supra*, is entirely inappropriate here. Under the circumstances of this case, the successor judge, who ruled on the motion for the new trial, was no more competent or experienced in the live facts of this case than is a court of review. His determination of the motion is entitled to no special weight or deference, and this Court should not hesitate to reverse the decision below.

III

Twenty-one days after the trial began, a mistrial was declared as to Schwimmer because of a heart attack

[20] Intent—particularly criminal intent—is a "triable issue of fact" and "should not be decided on depositions or affidavits". *United States* v. *Pellegrino* (S.D. N.Y., 1957) 155 F. Supp. 726, and *Miller* v. *Shell Oil Co.* (N.D. N.Y., 1958) 161 F. Supp. 373, 375.

which he suffered (Tr. 1486, 1520, 1535). Petitioner and Caudle thereupon moved for a mistrial as to themselves on the ground that certain evidence admitted as to Schwimmer alone was of such a prejudicial nature that its effects could not be eradicated from the jury's mind by instructions of the court, and that they were deprived of their right to cross-examine Schwimmer (Tr. 1535-47).

The motion was denied at that time, and the trial continued. At the conclusion of the trial the motion was renewed. Judge Hulen stated that it was "such a serious question", that he would let the case proceed, "and if there should be a conviction, then have time to give it the study it deserves" (Tr. 2208-09). Before the motion could be argued, Judge Hulen met his tragic death. Accordingly, the motion was heard and disposed of by Judge Nordbye who ruled as follows:

> "The Government was, of course, in no way responsible for the unfortunate turn of events with respect to Schwimmer's health. Whether he would testify if called as a witness for the defendants, or claim his constitutional privilege, was a matter of sheer speculation. Moreover, there was no showing or even contention that a declaration of a mistrial as to Connelly and Caudle and the resumption of the trial at some later date would enable these defendants to procure Schwimmer's testimony. So far as this record discloses, Schwimmer never may be able to testify for the defendants even though he were so disposed. Under these circumstances, it would seem to be reasonably free from doubt that Judge Hulen's ruling requiring the remaining defendants to stand trial was correct." (Appendix to original Petition for Certiorari, p. 31a).

On appeal to the Court of Appeals, petitioner and Candle renewed their contentions. In their brief to that court, they argued:

> "Schwimmer alone could have explained that evidence, supplied reasons or justification for his conduct. On cross-examination by these appellants, he could have exonerated one or both of them from the damaging implications of what he had said and done. His severance from the trial after his presence had served to implicate these appellants, deprived them of their right of confrontation and cross-examination, which this Court has upheld with constant solicitude." (Appellant's Brief, in the first appeal to the Eighth Circuit, p. 86).

The Government responded to this argument first by categorizing it as a "highly speculative contention," and then went on to say:

> "* * * Even had Schwimmer not become ill there is no showing that he would have waived his right *not* to take the stand and the fact that he claimed the Fifth Amendment before the grand jury (while having perhaps no other relevance since the *Grunewald* decision) at least supports an inference for purposes of this argument that he might not have taken the stand had he remained in the case. That his testimony would have aided the appellant is likewise a speculative assumption. Appellant's vigorous attempts to sever their case from his, prior to trial, evidences their belief that they would derive no positive benefit from his presence in the trial. And the appellants' observation that (Appellant's Br. 86) 'he could have exonerated one or both of them from the damaging implications of what he had said or done' is not well taken since his testimony might also have implicated the appellants had the government or

> the appellants had an opportunity to cross-examine him." (Government's Brief, in the first appeal to the Eighth Circuit, pp. 137-38).

The Government's argument found a receptive audience in the Court of Appeals, where it was adopted in its entirety:

> "It is suggested that when Schwimmer was removed as a defendant they were deprived of his possible testimony on the assumption that he would have taken the stand in his own defense. This he might or might not have done and in this connection it is observed that he invoked the Fifth Amendment when he was called before the grand jury. Neither is there any assurance that had he taken the witness stand his testimony would have any tendency to exonerate appellants." 249 F.2d at 582.

From the foregoing, it is clear that the assumptions underlying the successor judge's ruling on this question, and underlying the affirmance by the Court of Appeals, were that Schwimmer's testimony would be either unavailable or unfavorable. But these assumptions have now been wholly discredited. Schwimmer's testimony *is available* and *is favorable* to the defendants. Schwimmer has furnished the explanations which Judge Hulen considered so significant for the deliberation of the jury. His testimony has removed the "sheer speculation" as to whether "he will ever be able to testify in court or by way of deposition." We know now that Schwimmer has not resorted to the Fifth Amendment; indeed, that he has waived it. We know also that his testimony is of a nature tending to exonerate his co-defendants.

The question of whether a mistrial should have been granted to petitioner and Caudle after Schwimmer's severance from the trial was fundamental to a proper disposition of this case. If the successor judge was in error in denying that motion and if the Court of Appeals affirmed that error, all as a result of assumptions now proven incorrect, the convictions should not be permitted to stand.

Rule 33, F.R. Crim. P., expressly provides that a new trial may be granted to a defendant "if required in the interest of justice." The extraordinary situation which has arisen as a result of the belated availability of Schwimmer's testimony now requires that a new trial be granted in this case.

To permit petitioner to be deprived of his liberty because of theoretical assumptions, which the facts now disclose to be entirely incorrect, is not consonant with due process of law. It would, in addition, represent an encroachment of important Sixth Amendment rights which this Court "has been zealous to protect * * * from erosion." *Greene* v. *McElroy*, 360 U.S. 474, 496-97. Certainly, it violates this Court's oft repeated admonition that "to perform its high function in the best way 'justice must satisfy the appearance of justice'. *Offutt* v. *United States*, 348 U.S. 11." *In the Matters of Murchison and White*, 349 U.S. 133, 136. This case plainly presents a compelling instance for the exercise of this Court's "supervisory authority over the administration of criminal justice in the federal courts." *McNabb* v. *United States*, 318 U.S. 332, 341; *Offutt* v. *United States*, 348 U.S. 11, 13; *Smaldone* v. *United States*, 348 U.S. 961.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 705

MATTHEW J. CONNELLY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I

The Brief in Opposition fails to come to grips with the first issue presented in the Petition for Certiorari, where it is demonstrated that the criterion employed by various courts of appeals in determining motions for new trials based on newly-discovered evidence differs from that embraced by this Court.

In its Brief in Opposition, the Government apparently concedes the use of different standards; certainly it does not deny these differences. Instead, it seeks to engraft unwarranted qualifications upon this Court's

decisions in *Mesarosh* v. *United States*, 352 U.S. 1 and *Griffin* v. *United States*, 336 U.S. 704.

A. *Mesarosh*, according to the Government, "mainly has significance where it is claimed that an important Government witness perjured himself at the trial." (Br. in Opp., p. 17). It should be noted that the Government qualifies this assertion with the word "mainly." Nevertheless, the argument in the Brief in Opposition is much too glib. This Court acknowledged that *Mesarosh* was not a typical case in which a defendant sought to show that a Government witness had made, subsequent to the trial, untruthful statements affecting his credibility at the trial. Such a contention, this Court observed, cannot "ordinarily" "support a motion for a new trial, because new evidence which is 'merely cumulative or impeaching' is not * * * an adequate basis for the grant of a new trial." 352 U.S. at 9.

In this case, as in *Mesarosh*, however, "we have an entirely different situation." 352 U.S. at 10. Since no claim has been made in this motion that a Government witness has made untruthful statements which would affect his credibility at the trial, the new evidence which has been proffered is not "merely cumulative or impeaching", but is "new" in every sense of the word.

There is a further reason why *Mesarosh* sets the pattern for the instant case. A critical issue in *Mesa-*

Judge Nordbye held that Schwimmer's testimony "is not merely cumulative, although in many respects it only tends to corroborate the evidence that the defendants had offered heretofore in their behalf at the trial". App. 80. To the extent that Schwimmer's testimony corroborates the testimony of petitioner at the trial, such evidence is a sound ground for granting a motion for a new trial. See Petition for Certiorari, p. 20, particularly n. 15.

rosh was whether the district judge was the proper agency to determine that there was sufficient evidence at the trial, other than certain perjured testimony, to sustain a conviction. In ordering a new trial, this Court pointed out that the perjured testimony "has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity." 352 U.S. at 14. A similar pollution has occurred in this case. The most incriminating portion of the prosecution's case rested upon the words, acts, and documents of Harry Schwimmer, which came into evidence without any explanation and permitted implications, inferences and innuendoes which no one could dispel. Particularly damaging was Exhibit 100-J. This cryptic and unexplained entry by Schwimmer enabled the jury to infer that there was a connection between Sachs' money and petitioner.

With the testimony of Schwimmer—now available for the first time—this crucial evidence is cast in an entirely different light. This testimony negates the inferences upon which petitioner's conviction was based, and completely dispels the damaging implications which the prosecution was able to draw before the jury from what the trial judge called "a very poisonous piece of evidence" (Tr. 2885) at the original trial. Certainly, this is not the ordinary case, which this Court distinguished in *Mesarosh*, of a motion for a new trial predicated on untruthful statements which affect a Government witness' credibility. Clearly, it is the kind of case which falls within the ambit of *Mesarosh*, and requires that the "reservoir" be "cleansed."

B. The Government seeks to attenuate the holding in *Griffin* by equally specious reasoning. "It is quite

evident", the Brief in Opposition contends, "that the court was disposing of the capital case before it, but was not attempting to lay down an unbending rule that should govern all cases of all types." (Br. in Opp., p. 18). But the Government does not, and indeed cannot, point to one single line of the *Griffin* decision to support this narrow reading. It is of course true that *Griffin* was a capital case. Yet it is also true that Rule 33, F.R. Crim. P., does not impose a different standard for capital cases than it does for non-capital cases.

What is significant about the *Griffin* case is that it did not involve perjured testimony or the recantation by a Government witness.[2] Like the instant case, it did involve the presentation, for the first time and subsequent to the trial, of important evidence which had not been available at the trial. And in the *Griffin* decision, this Court evinced the same concern for the role of the jury in criminal cases as it did in *Mesarosh* when it reminded the lower court that it would have to consider further whether "it would not be too dogmatic

[2] With regard to a witness recanting his prior testimony, this Court, in *Mesarosh*, cited *Flaxa v. United States*, 130 F. Supp. 413 (S.D.N.Y. 1955), *reargument denied*, 131 F. Supp. 742. In that case, the defense moved for a new trial on the basis of an affidavit in which a witness recanted, after the trial, testimony given in behalf of the Government at the trial. The Government charged that the recantation, rather than the testimony it contradicted, was the lie. The court held that the evidence, then available for the first time, showed that the witness lied either when he testified or when he recanted. Thus, since there was internal evidence of perjury which was related to the "strongest single item of evidence" against one of the defendants, and the witness' testimony "was almost the only persuasive evidence" of another defendant's "personal intent", a new trial must be granted to these two defendants because, "the jury *might* have reached a different conclusion" were it not for the witness' testimony. (Emphasis the court's.) 130 F. Supp. at 420-421.

on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it." *Griffin* v. *United States*, 336 U.S. at 709; *cf.*, *Mesarosh* v. *United States*, 352 U.S. at 10-12.

C. The argument contained in the Government's Brief in Opposition with regard to the criterion applicable to motions for a new trial based on newly discovered evidence is significant more for what it does not say than for what it does. Nowhere does it affirmatively seek to support the standard applied by the courts below, which—as we have poined out in our Petition (pp. 11-12)—is the fifth verity of *Johnson* v. *United States* (C.A. 8, 1929), 32 F. 2d 127. The Government has argued against the standard established by this Court's decisions in *Mesarosh* and *Griffin*, but has suggested none to replace it.

In short, by a labored process of confession and avoidance, the Government has corroborated the argument contained in our Petition that the legal criterion applicable to motions for new trials based upon newly discovered evidence is not clearly delineated. The Brief in Opposition supports our argument that this matter is clothed in confusion and calls for resolution by this Court.[3]

[3] The Government suggests that the criterion used by the courts below was urged by petitioner in their motions for a new trial, and that therefore they framed the issue in the terms which they now criticize (Br. in Opp., p. 16).

This is not true. In his motion for a new trial, petitioner was arguing that the absence of Schwimmer's testimony at the trial seriously prejudiced him; and *in that context* stated that had Schwimmer's testimony been available, petitioner "should have won an acquittal and been exonerated." (R. 7). This was not

II

The Brief in Opposition places considerable reliance upon this Court's decision in *United States* v. *Johnson*, 237 U.S. 106 (Br. in Opp., pp. 13-15, 19), in an attempt to circumscribe the role of this Court in the review of this case. The *Johnson* case, however, simply holds that orders granting or denying motions for a new trial, when review is sought on the ground that the trial court made erroneous findings of fact, should not be disturbed by reviewing courts where the findings are supported by any evidence. 327 U.S. at 111-12.

It is readily apparent that the *Johnson* rule is wholly inapplicable here. In the first place, *Johnson* does not preclude an appellate court from determining whether a trial court has applied the correct legal criterion in the determination of a motion for a new trial. This presents a question of law, and is and always has been properly subject to full appellate review.

Secondly, the *Johnson* decision is inapplicable to the determination of the issues presented in this case because *Johnson* was predicated on the concept that the judge who presides at a trial is in a superior position to pass upon motions for a new trial based upon newly discovered evidence: that the trial judge "had conducted the original trial and had watched the case * * *

"framing the issue", but rather describing the importance of Schwimmer's testimony.

On the other hand, the Government urged the *Johnson* formula from the outset (Brief for the United States in the District Court in Opposition to the Motion for New Trial of Defendant Connelly, pp. 24, 26-27, 35; and continued to press it in the Court of Appeals (Brief of the United States in the Court of Appeals, pp. 49, 53-54, 66).

unfold from day to day" and was "exceptionally qualified" (327 U.S. at 112) since he was able to draw upon "his own knowledge of the original six-weeks trial." (327 U.S. at 109). Here, of course, Judge Nordbye, as Successor Judge, had *not* seen the case "unfold from day to day" and was therefore *not* "exceptionally qualified" since he could *not* draw upon "his own knowledge of the original six-weeks trial."[4] His review was based on nothing more than a reading of the cold record, and his determination of the present motion does not call for the special deference to which this Court alluded in *Johnson*.[5]

III

A. Much is made of the fact that in the prior stages of this litigation petitioners have described Schwimmer in uncomplimentary terms (Br. in Opp., p. 22, par-

[4] The suggestion that this issue was "extensively litigated on the first appeal" and that this is an attempt to "revive the same arguments in the present proceeding" (Br. in Opp., p. 15) merits only brief reply. The first appeal had to do with the propriety of Judge Nordbye's rulings on certain pre-verdict and post-verdict motions, none of which had to do with Schwimmer's testimony which was then not available. In consequence, the most that could have been decided in the prior proceeding was that it was appropriate for Judge Nordbye, as Successor Judge, to decide the motions in the prior proceeding.

[5] The statement at p. 15 of the Brief in Opposition that "the substitution of judges was of diminished importance" because the prosecution's evidence "was virtually all documentary" is not correct.

Sixty-six witnesses testified in person, mostly on behalf of the Government. Furthermore, the defendants were themselves on the stand for five days of the thirty-eight day trial. Judge Hulen, the trial judge, stated that intent is the "gist of this case" (Tr. 2893) and Judge Nordbye himself acknowledged that the "crucial question" in the case was one of "intent" (Appendix to original Petition for Certiorari, p. 62a).

ticularly n. 7). The gist of these characterizations was that Schwimmer was the arch conspirator and the sole author of the whole nefarious scheme. Petitioner does not now retract any of this obloquy; he reiterates it.

Schwimmer's activities and the central position he occupied in the conspiracy which is the subject of this prosecution are the very reasons why his testimony is so essential to any fair trial of petitioner. Only he can dispel the inferences and innuendoes upon which the flimsy chain of circumstantial evidence was based.

That Schwimmer may be a man of "low moral character" does not make his testimony any the less important. "[O]ur law has never undertaken to set any quantative standards of verity; we have unconditionally left it to the jury to determine how persuasive the testimony of any witness will be." *United States* v. *Reina* (C.A. 2, 1957), 242 F. 2d 302, 307. "As a witness, a defendant is no more to be visited with condemnation than he is to be clothed with sanctity, simply because he is under accusation, and there is no presumption of law in favor of or against his truthfulness." *Allison* v. *United States*, 160 U.S. 203, 210.

B. For like reasons, the references by the courts below and the Brief in Opposition to Schwimmer as "an admitted perjurer" (App. 90, 97; Br. in Opp. p. 22) are unjustified. The courts below and the Government fail to distinguish between a *conviction* for perjury and an *indictment* for perjury. *Cf.*, *Allison* v. *United States*, *supra* at 210. But more important, this condemnation of Schwimmer results in a fundamental inconsistency since it goes in opposite directions at the same time. The Government has already indicted

Schwimmer for perjury, claiming that his testimony before the grand jury relating to Exhibit 100-J was false (Br. in Opp., pp. 6-7, particularly n. 3). Now it argues from an entirely opposite pole: that the testimony of Schwimmer *in this proceeding* is unreliable because it is inconsistent with Schwimmer's testimony before the grand jury (Br. in Opp., p. 22). For the purpose of justifying the indictment of Schwimmer, the Government claimed that his grand jury testimony was false; for purposes of this proceeding, the Government contends that it was true. The Government cannot have its cake and eat it too!

That Schwimmer's present testimony may be inconsistent with his grand jury testimony does not necessarily require the conclusion that his present testimony is true. However, the fact that his present testimony may have substantiated, rather than disproved, the charge of perjury pending against him—thereby constituting an admission against his interest—lends considerable credence to his present testimony.

It is no more appropriate for us to judge Schwimmer's present capacity for truthfulness than it was for the courts below. It is in order to observe, however, that during the period of his critical illness, when he was at the very threshold of death, and when he had lost the power to speak, to read, and to write, he had ample opportunity for self communion; and it is not inappropriate to suggest that he may now have acquired a greater respect for truth and integrity. Certainly, there is enough here to require that a jury be given an opportunity to make its own judgment as to his credibility.

IV

Finally, we respectfully call to this Court's attention the lack of any response of any kind to Point III in our Petition. It was there pointed out that the decisions of the courts below in the prior proceedings in this case were predicated upon the assumption that Schwimmer's testimony would be either unavailable or unfavorable; that this assumption has now been unequivocally disproved; and that, under the circumstances, due process of law and the interest of justice require that a new trial now be granted.

We suggest that there has been no response to this Point III because there is no other conclusion which can properly be drawn.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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